

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

LAURIE MILLER, BRIAN DIMAS,
KIM MILLS, ANTHONY SOZA,
BRUCE CAMPBELL, KELLIE
BOWERS, TIM HUNTER, BRIAN
SAYLOR, MICHAEL SCHAMADAN,
INDIVIDUALLY AND AS
REPRESENTATIVE OF THE ESTATE
OF HIS WIFE, BRANDI SCHAMADAN,

Plaintiffs,

vs.

YORK RISK SERVICES GROUP and
FRANK GATES SERVICE COMPANY,

Defendants.

2:13-cv-1419 JWS

ORDER AND OPINION

[Re: Motions at Dockets 271 and 291]

I. MOTIONS PRESENTED

At docket 271 defendants filed a motion to compel certain plaintiffs to participate in an independent medical examination ("IME"), and certain plaintiffs to participate in an independent psychological examination ("IPE"). The motion was re-filed under seal at docket 291. The motion at docket 291 differs from the earlier motion in that it includes text which had been redacted from the motion at docket 271. Plaintiffs' response is at docket 323. Defendants' reply is at docket 341. Oral argument was not requested and would not assist the court.

II. DISCUSSION

Defendants seek IMEs of all plaintiffs except Michael Schamadan. They seek IPEs of plaintiffs Saylor, Miller, and Schamadan. The parties are familiar with the background for this case, and it has been described in earlier orders from the court. What is significant for purposes of the present motion are the matters for which the various plaintiffs are seeking to recover damages from defendants. These are found in their allegations in the Fourth Amended Complaint.¹

Plaintiff Hunter alleges that due to defendants' conduct he has suffered "significant economic damage, humiliation, worry, distress, and continuing economic and physical damage."² The allegation that he suffers continuing physical damage caused by defendants puts his physical condition at issue in the lawsuit. The same or very similar allegations about worry, distress, and continuing physical injury caused by defendants are pled by plaintiffs Bowers,³ Miller,⁴ Dimas,⁵ Mills,⁶ Soza,⁷ Campbell,⁸ Saylor,⁹ and Klages.¹⁰ These eight plaintiffs' allegations do not allege any severe emotional problems caused by defendants for which they seek damages. Rather, in association with their economic and physical damages, they merely plead "garden

¹Doc. 208.

²*Id.*, ¶ 21.

³*Id.*, ¶ 27.

⁴*Id.*, ¶ 32.

⁵*Id.*, ¶ 39.

⁶*Id.*, ¶ 47.

⁷*Id.*, ¶ 53.

⁸*Id.*, ¶ 59.

⁹*Id.*, ¶ 65.

¹⁰*Id.*, ¶ 71.

1 variety” allegations of worry and distress. Defendants concede that IPEs are not
2 generally ordered where a plaintiff presents a “garden variety” demand for emotional
3 distress damages.¹¹ However, plaintiff Schmadan alleges that defendants’ outrageous
4 conduct caused him “to suffer severe emotional distress”¹² giving rise to his claim for
5 intentional infliction of emotional distress. Thus, Schmadan, alone among the plaintiffs,
6 has pled a claim for the type of emotional distress which might support an IPE.¹³

7 Rule 35(a) authorizes district courts to order IMEs and IPEs where two
8 conditions are met. First, the physical or mental condition must be at issue.¹⁴ Second,
9 the party seeking the examination must show good cause why it is needed.¹⁵ Here it is
10 clear that the physical condition of all plaintiffs, save plaintiff Schamadan, is at issue.
11 Conversely, the only plaintiff as to whom his mental condition is at issue is Schamadan.

12 Plaintiffs argue strenuously that defendants have not shown good cause for any
13 of the examinations, because defendants have available a multitude of medical records,
14 treating physician information, and IMEs that were done back when their disability
15 claims were being processed.¹⁶ The court agrees with defendants that this argument is
16 unavailing, because plaintiffs are seeking damages for physical harm that resulted from
17 defendants conduct, not just damages for the disabilities which were adjusted by

18 ¹¹Doc. 291 at 6.

19 ¹²Doc. 208, ¶ 113.

20 ¹³Defendants cite deposition testimony by plaintiffs Saylor and Miller, which they say
21 supports the proposition that they are making claims which warrant IPEs. There are two
22 problems with defendants’ argument. First, Saylor and Miller have not pled claims for emotional
23 distress of a type that would support an IPE. Second, read in context, the testimony essentially
24 fleshes out plaintiffs’ physical injuries. Thus, the court does not read the deposition testimony
25 to take Saylor and Miller’s assertions of emotional issues beyond the level of “garden variety.”

26 ¹⁴Fed. R. Civ. P. 35(a)(1).

27 ¹⁵Fed. R. Civ. P. 35(a)(2)(A).

28 ¹⁶There is considerable irony in plaintiffs’ argument about the adequacy of the prior
IMEs, for generally their position in this litigation is that the professionals who performed the
earlier IMEs did not do a proper job and were acting in league with defendants.

1 defendants. Similarly, plaintiff Schamadan is seeking to recover for severe emotional
2 distress caused by defendants. In sum, defendants have shown good cause for the
3 IMEs of all plaintiffs, save Schamadan, and good cause for an IPE of plaintiff
4 Schamadan.

5 Plaintiffs protest that they had no input into the selection of the doctors who are
6 to perform the examinations. Yet, the history of the parties' efforts to resolve
7 defendants' requests for examinations shows that plaintiffs insisted there would be no
8 examinations, thereby eliminating a chance to work toward selection of mutually
9 agreeable examiners. Moreover, Rule 35 does not require any sort of mutual agreement
10 upon the identity of the examiners. Finally, plaintiffs do not assert that any of the
11 examiners identified by defendants are not competent to perform the examination
12 requested.

13 **III. CONCLUSION**

14 For the reasons above, the motions at dockets 271 and 291 are GRANTED in
15 part and DENIED in part as follows:

16 IT IS HEREBY ORDERED that the following plaintiffs are required to participate
17 in an Independent Medical Examination or an Independent Psychological Examination
18 as follows:

19 1. Plaintiffs Hunter and Saylor will be examined by Dr. Barry Hendin, located at
20 Phoenix Neurological Associates, 5090 N. 40th Street, Ste. 250, Phoenix, Arizona
21 85018. The manner of the examinations will be in-office exams that will include a
22 patient interview and a physical exam at the above-mentioned location. The scope of
23 the examinations will be related to plaintiff Hunter's and plaintiff Saylor's allegations of
24 neurological injuries allegedly caused or exacerbated by defendants' conduct. The
25 examinations will take place on a date and time to be announced that is mutually
26 convenient for the doctor and plaintiffs.

27 2. Plaintiffs Saylor, Mills, Campbell, Dimas, and Soza will be examined by
28 Dr. Douglas Hartzler, located at Arizona Orthopedic Associates, 690 N. Cofco Center

1 Court, Ste. 290, Phoenix, Arizona 85008. The manner of the examinations will be in-
2 office exams that will include a patient interview and a physical exam at the above-
3 mentioned location. The scope of the examination will be related to the plaintiffs'
4 allegations of orthopedic injuries allegedly caused or exacerbated by defendants'
5 conduct. The examinations will take place on a date and time to be announced that is
6 mutually convenient for the doctor and plaintiffs.

7 3. Plaintiff Miller will be examined by Dr. Paul Sawrey, located at Biltmore
8 Cardiology, 4444 North 32nd Street, Ste. 175, Phoenix, Arizona 85018. The manner of
9 the examination will be an in-office exam that will include a patient interview and a
10 physical exam at the above-mentioned location. The scope of the examination will be
11 related to plaintiff's alleged cardiac injuries allegedly caused or exacerbated by
12 defendants' conduct. The examinations will take place on a date and time to be
13 announced that is mutually convenient for the doctor and plaintiff.

14 4. Plaintiff Schamadan will be examined by Dr. Pamela Wilson, Ph.D.,
15 ABPP/CN, located at 8035 N. 85th Way, Scottsdale, Arizona 85258. The manner of the
16 examinations will be an in-office exam that will include a clinical interview and
17 psychological testing at the above-mentioned location. The scope of the examination
18 will be related to plaintiff Schamadan's alleged psychological injuries comprising the
19 severe emotional distress allegedly caused by defendants' conduct. The examinations
20 will take place on a date and time to be announced that is mutually convenient for the
21 doctor and plaintiff.

22 DATED this 27th day of August 2014.

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24 /s/ JOHN W. SEDWICK
25 SENIOR UNITED STATES DISTRICT JUDGE
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